PP

v.

IRAN SAKDON

HIGH COURT MALAYA, MELAKA
AUGUSTINE PAUL J
[CRIMINAL APPEAL NO: 41-30-97]
30 APRIL 1998

CRIMINAL PROCEDURE: *Sentence - Principles applicable - When appellate court will interfere with sentence imposed by lower court*

CRIMINAL PROCEDURE: *Sentence - Mitigating factors - Period in remand - Whether such period should be considered - Discretion of judge - Criminal Procedure Code, s. 282*

CRIMINAL PROCEDURE: *Sentence - Mitigating factors - Guilty plea -When guilty plea considered*

CRIMINAL PROCEDURE: *Sentence - Mitigating factors - Disparity between the weight in the amended charge and the original charge taken into account - Whether such factor should have been considered*

CRIMINAL PROCEDURE: *Sentence - Mitigating factors - Order of police supervision taken into account as a form of punishment - Whether such factor should have been considered*

The accused was charged for possession of morphine in contravention of s. 12(2) of the Dangerous Drugs Act 1952. In imposing a sentence of 30 months' imprisonment from the date of his arrest to be followed by a police supervision for 12 months, the magistrate had forwarded five reasons to justify the sentence, namely, that:

(a) the accused had been free from any conviction since his last conviction on 3 December 1994;

(b) the term of imprisonment ordered was to be followed by an order for police supervision;

(c) the accused had been in remand from the date of his arrest;

(d) the guilty plea of the accused had saved the time and expense of the court, the prosecution and the witnesses; and

(e) the weight of the drugs in the amended charge was lesser than in the original charge, ie, it was reduced from 2.4 grams to 0.10 grams after analysis by the Chemistry Department.

The prosecution appealed contending that the reasons given by the magistrate were wrong in law.

Held:

[1] An appellate court will not interfere with the sentence imposed unless the magistrate has proceeded on wrong principles or has given undue weight to some of the evidence. If a sentence is excessive or inadequate to such an extent as to satisfy an appellate court that when it was passed there was a failure to apply the right principles, the interference by the court is justified.

[2] The magistrate was wrong in law in taking into account the time spent in prison. This was because there would have been no opportunity to commit the offence during that period for obvious reasons.

[3] The magistrate had taken into account the order for police supervision and had considered it as a form of punishment. This had influenced him in the prison term and was clearly wrong in law.

[3a] Section 282(d) of the Criminal Procedure Code provides that every sentence of imprisonment shall take effect from the date on which the same was passed unless the court passing such sentence otherwise directs. Such a direction may include an order that a sentence of imprisonment is to take effect from the date on which the offender is arrested. The exercise of this power is discretionary.

[3b] A period of remand can therefore operate in favour of an offender in only one of the two following ways. If the sentence of imprisonment is to take effect from the date it was passed then the period spent in remand may be considered in assessing the prison term. If that course is adopted then the prison term cannot be ordered to take effect from the date of arrest. If the period spent in remand is not taken into account in assessing sentence then the sentence of imprisonment imposed may be ordered to take effect from the date of arrest. A consideration of the period in remand in assessing sentence followed by an order that the sentence of imprisonment is to take effect from the date of arrest amounts to double credit being given for the same factor. This is wrong in law.

[4] As a general rule, a plea of guilt should be considered as a mitigating factor as it not only saves the country a great expense of a lengthy trial but also saves time and inconvenience of many, particularly the witnesses. However, a guilty plea ought to be considered in favour of the accused only when all other factors and circumstances surrounding the commission of the offence justify such a consideration.

[4a] In this case there was virtually no defence available to the accused as the drugs, the subject matter of the offence for which he was charged, were recovered from his pocket. His list of previous convictions also show that he had exhausted the mitigating factors that he had in his favour. The magistrate therefore had given undue weight to such guilty plea.

[5] In considering the difference between the weight of the drugs in the original and amended charge, the magistrate was wrong in law because it is the right of the prosecution to amend the charge and, accordingly, to treat the exercise of that right as affecting the sentence to be passed is a gross miscarriage of justice.

[Order substituted with imprisonment of 5 years from date of arrest.]

Case(s) referred to:
Abu Bakar bin Alif v. R [1953] MLJ 19 ***(cit)***
Lian Kian Boon v. PP [1990] 2 CLJ 799 ***(not foll)***
Philip Lau Chee Heng v. PP [1988] 1 CLJ 873 ***(cit)***
PP v. Govindnan a/l Chinden Nair [1998] 2 MLJ 181 ***(foll)***
PP v. Jafa bin Daud [1981] 1 MLJ 315 ***(cit)***
Re Bakar bin Ahmad [1959] MLJ 256 ***(refd)***
Re Chang Cheng Hoe & Ors [1966] 2 MLJ 252 ***(cit)***
R v. Layton [1959] Crim LR 61 ***(cit)***
R v. Leo De Cruz [1935] MLJ 1 ***(cit)***
R v. Newman [1959] Crim LR 138 ***(cit)***
R v. Teo Cheng Lian [1949] MLJ 170 ***(refd)***
R v. Yakimovitch [1960] Crim LR 66 ***(cit)***
Sau Soo Kin v. PP [1975] 2 MLJ 134 ***(cit)***
Sia Ah Kew & Ors v. PP [1974] 1 MLJ 125 ***(cit)***
Sinniah Pillay v. PP [1992] 1 SLR 225 ***(cit)***
Zaidon Shariff v. PP [1996] 4 CLJ 441 ***(foll)***

Legislation referred to:
Criminal Procedure Code, ss. 173(b), 282(d)
Dangerous Drugs Act 1952, s. 12(2)

For the prosecution - Anslem Charles Fernandis, DPP
Accused in person

Reported by Mariette Peters-Goh

JUDGMENT

Augustine Paul J:

The charge preferred against the accused in the Magistrates Court at Melaka was for being in possession of 0.10 grams of morphine on 25 July 1997 in contravention of s. 12(2) of the Dangerous Drugs Act 1952 and punishable with a fine not exceeding twenty thousand ringgit or imprisonment for a term not exceeding five years or both.

The accused pleaded guilty to the charge when it was read and explained to him. He understood the nature and consequences of his plea. He admitted the facts of the case as presented by the prosecution and the learned magistrate accepted his guilty plea. In his plea in mitigation the accused prayed for leniency in view of his plea. He had 22 previous convictions. The first was in 1973 and the last in 1994. Seven of the previous convictions were drug related while most of the remaining ones were for theft. The last conviction on 3 December 1994 was for possession of dangerous drugs for which he was sentenced to 36 months' imprisonment. Accordingly, the prosecution prayed for a deterrent sentence as the previous convictions did not seem to have had any effect on him. The learned magistrate convicted the accused and imposed a sentence of 30 months' imprisonment from the date of his arrest to be followed by police supervision for 12 months. The prosecution appealed against this sentence.

In his grounds of judgment the learned magistrate advanced five reasons to justify the sentence that he had imposed. They are –

(a) the accused has been free from any conviction since his last conviction on 3 December 1994;

(b) the term of imprisonment ordered is to be followed by an order for police supervision;

(c) the accused has been in remand from the date of his arrest;

(d) the guilty plea of the accused has saved the time and expense of the court, the prosecution and the witnesses; and

(e) the weight of the drugs in the amended charge was lesser than in the original charge, that is to say, it was reduced from 2.4 grams to 0.10 grams after analysis by the Chemistry Department.

In his submission before me the learned deputy public prosecutor contended that the reasons given by the learned magistrate in support of the sentence that he had imposed are wrong in law. He said that the learned magistrate's view that the accused has been free from crime for the last three years is incomprehensible as the accused was in prison for a greater part of that period. He referred to *Re Bakar bin Ahmad* [1959] MLJ 256 and said that the order for police supervision should not have been considered as a ground for imposing the sentence. He said that the manner of treating the accused's period in remand in imposing the sentence was wrong. He concluded by saying that the learned magistrate had failed to take public interest into consideration in imposing the sentence. The accused prayed that the sentence imposed on him be not disturbed.

The principles governing an appeal against sentence are well settled. It has been laid down that an appellate court will not interfere with the sentence imposed unless the magistrate has proceeded on wrong principles or has given undue weight to some of the evidence (see *R v. Leo De Cruz* [1935] MLJ 1). If a sentence is excessive or inadequate to such an extent as to satisfy an appellate court that when it was passed there was a failure to apply the right principles, then intervention by the court is justified (see *Abu Bakar bin Alif v. R* [1953] MLJ 19). As Gordon-Smith J said in *R v. Teo Cheng Lian* [1949] MLJ 170 at p 171:

> There must be a manifest error, either in law or in considering the facts and circumstances of the case or an omission to consider such facts and circumstances, before the higher court interferes with the discretion undoubtedly vested in the lower court.

Section 173(b) of the Criminal Procedure Code provides that if the accused pleads guilty to the charge, whether as originally framed or as amended, the plea shall be recorded and he may be convicted thereon and the court shall pass sentence according to law. The phrase "pass sentence according to law" in the sub-section means that the sentence imposed must not only be within the ambit of the punishable section but it must also be assessed and passed in accordance with established judicial principles (see *Re Chang Cheng Hoe & Ors* [1966] 2 MLJ 252; *PP v. Jafa bin Daud* [1981] 1 MLJ 315; *Philip Lau Chee Heng v. PP* [1988] 1 CLJ 873; [1988] 3 MLJ 107).

I shall now consider whether the five grounds which influenced the learned magistrate to impose the sentence that he did accord with established legal principles in passing sentence.

That The Accused Was Free From Crime For A Period Of Three Years After The Last Conviction

In appropriate cases the fact that an accused person has had a clean record since his last conviction may operate as a mitigating factor. I had occasion to consider this principle in *Zaidon Shariff v. PP* [1996] 4 CLJ 441 where I said at pp. 447-8:

> In any event the fact that there has been a ten-year gap in the appellant's criminal record has not been duly appreciated by the learned magistrate. The appellant's clean record since his last conviction in 1986 ought to have operated as a mitigating rather than as an aggravating factor. The rationale of the gap principle is that the offender has made an effort to rehabilitate himself and it should, accordingly, operate in his favour. In this regard, D.A. Thomas in his book entitled *Principles of Sentencing* said at p. 179:
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> > The fact that an offender who has a criminal record has made an effort to 'go straight' since his last conviction or release from prison normally counts as a substantial mitigating factor if he subsequently commits an offence. In the case where the previous offences were trivial and committed in the long distant past, the Court will normally disregard them entirely and treat the offender as a man of previous good character. Where the previous convictions are more numerous or are for offences of a more serious character, the existence of a period free from conviction immediately before the commission of the present offence still has substantial mitigating effect. Clearly, the longer the period, the more effect it will have in mitigating, but while in some of the cases illustrating this point the period may be as long as twelve years, the Court will normally give credit for much shorter periods. In *Rosa*, a man of 41 sentenced to four years for house breaking had ten previous convictions for dishonesty and violence, and had on one occasion been sentenced to seven years' imprisonment for wounding with intent. After his release from his sentence he had married, and in the following four years had been convicted only once in respect of a minor offence for which he was fined, and achieved a work record which was 'distinctly to his credit'. In view of the appellant's effort to reform, the sentence was reduced to two years' imprisonment.
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> The gap principle has received judicial recognition in a plethora of cases. See, for example, *R v. Nuttall* [1908] 1 Cr App Rep 180 and *R v. Bibbings* [1918] 13 Cr App Rep 205. In *R v. Goodwin and Wilkinson* [1910] 12 Cr App Rep 85 it was held that a period of honest work between the termination of a sentence and subsequent conviction ought to be taken into account in passing sentence for the latter.

It is therefore clear that the gap principle is activated only after the termination of the last prison sentence. This is logical as it is only then that there can be an opportunity to determine whether the offender has made an effort to rehabilitate himself. It is ludicrous to take into account the time spent in prison for this purpose as there would have been no opportunity to commit an offence during that period for obvious reasons. The learned magistrate has taken into account the period from the date the prison term was imposed in sentencing the accused. This is clearly wrong in law.

Order Of Police Supervision

The law relating to an order for police supervision was stated by Rigby J in *Re Bakar bin Ahmad* [1959] MLJ 256 in the following terms:

> Police supervision should not be imposed by way of an additional punishment. Its sole object and only justification, as I understand it, is to ensure that in the interests of public security the Police are in a position to exercise some measure of control over the movements and activities of persons of known bad character – such as burglars, pickpockets and common thieves - who habitually and consistently lead a life of criminal dishonesty.

Whilst I do not dispute that an order for police supervision can be made in the case of persistent drug offenders the order made by the learned magistrate in this case is anchored on wrong principles. The fact that he has taken the order for police supervision into account in assessing sentence means that he has considered it as a form of punishment thereby influencing him in the prison term that he imposed. This is wrong in law.

Period In Remand

The learned magistrate has taken into account the period of remand of the accused prior to his conviction in imposing sentence and has at the same time ordered the imprisonment term to commence from the date of arrest. Section 282(d) of the Criminal Procedure Code provides that every sentence of imprisonment shall take effect from the date on which the same was passed unless the court passing such sentence otherwise directs. Such a direction may include an order that a sentence of imprisonment is to take effect from the date on which the offender was arrested. The exercise of this power is discretionary (see *Sinniah Pillay v. PP* [1992] 1 SLR 225). A court may also make some allowance in imposing sentence where the accused has spent a long time in custody while awaiting trial (see *R v. Layton* [1959] Crim LR 61; *R v. Newman* [1959] Crim LR 138; *R v. Yakimovitch* [1960] Crim LR 66). The exercise of this power is again discretionary and thus I would not agree, with respect, with the view expressed in *Lian Kian Boon v. PP* [1990] 2 CLJ 799; [1991] 1 MLJ 51 "…. that in the ordinary course of events the

period of his detention should have been taken into consideration and deducted from the sentence of 12 months." In my opinion a period of remand can therefore operate in favour of an offender in only one of the two following ways. If the sentence of imprisonment is to take effect from the date it was passed then the period spent in remand may be considered in assessing the prison term. If that course is adopted then the prison term cannot be ordered to take effect from the date of arrest. If the period spent in remand is not taken into account in assessing sentence then the sentence of imprisonment imposed may be ordered to take effect from the date of arrest. A consideration of the period in remand in assessing sentence followed by an order that the sentence of imprisonment is to take effect from the date of arrest amounts to double credit being given for the same factor. This is wrong in law.

The Guilty Plea

I agree that generally stated a plea of guilt should be considered as a mitigating factor as it not only saves the country a great expense of a lengthy trial but also saves time and inconvenience of many, particularly the witnesses (see *Sau Soo Kin v. PP* [1975] 2 MLJ 134). However, in my opinion, a guilty plea ought to be considered in favour of the accused only when all other factors and circumstances surrounding the commission of the offence justify such a consideration. As I observed in *PP v. Govindnan a/l Chinden Nair* [1998] 2 MLJ 181 at p 192:

> Its application in favour of the accused depends on the circumstances of each case (see *Wong Kai Chuen Philip v. PP* [1991] 1 MLJ 321). In *PP v. Low Kok Wai* [1988] 3 MLJ 123, Mohamed Dzaiddin J (as he then was) said at p 124:
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> > …. In the present case, the only mitigating factor is the accused's plea of guilty. It is a principle of sentencing that whenever possible the court should take into account as a mitigating factor the fact that the accused has pleaded guilty. The extent to which a plea of guilty is a mitigating factor must depend on the facts of each case, and it cannot be a powerful mitigating factor when effectively no defence to the charge was available to the accused (see *Archbold* (42nd Ed) para 4-480 citing *R v. Davis* (1980) 2 Cr App R (s) 168).
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> The severity of the offence committed may outweigh the mitigating effect of a guilty plea (see *Lee Say & Ors v. PP* [1985] 2 CLJ 155; *Loh Hock Seng v. PP* [1980] 2 MLJ 13; *PP v. Oo Leng Swee & Ors* [1981] 1 MLJ 247). Where public interest demands a deterrent sentence in the circumstances of a particular case, then the effect of such a plea must also give way. In this regard, I refer to *R v. Costen* [1989] II Cr App R(S) 182 where Lord Lane said at p 184:

> But there are certain exceptions, likewise well authenticated in the authorities, to that general rule that discount will be allowed for a plea of guilty. The first and most important exception is the protection of the public. Where it is necessary that a long sentence, if necessary the maximum sentence, should be passed in order to protect the public, in those circumstances, a plea of guilty may not result in any discount.

Thus, there can be no automatic rule that a guilty plea on its own entitles an accused to a lesser punishment.

In this case there was virtually no defence available to the accused as the drugs, the subject matter of the offence for which he was charged, were recovered from his pocket. His list of previous convictions also show that he has exhausted the mitigating factors that he had in his favour. In this regard I refer to *Govindnan* where I said at p 191:

> Where a person is found to be a persistent offender, then it is in the interest of justice that a deterrent sentence should be passed (see *PP v. Jafa bin Daud* [1981] 1 MLJ 315). This does not mean that a person with previous convictions is not entitled to lenient treatment. But where a person's previous convictions increase progressively, the mitigating factors in his favour diminish correspondingly and may even be exhausted. In this regard, useful reference may be made to *Principles of Sentencing* by DA Thomas where the learned author says at p 176:
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> > The mitigating effect of good character is not, as has been argued already, confined to the man with no previous convictions; the true position is that it diminishes as the offender's criminal record increases, until it reaches a point at which it is exhausted.

It is therefore my view that the learned magistrate has given undue weight to the guilty plea of the accused.

Difference Between The Weight Of The Drugs In The Original And Amended Charge

I am unable to comprehend how the reduction of the weight of the drugs in the amended charge can amount to a factor to be considered in assessing sentence. It is the right of the prosecution to amend the charge and, accordingly, to treat the exercise of that right as affecting the sentence to be passed is a gross miscarriage of justice.

In the circumstances it was my view that the learned magistrate had acted on wrong judicial principles in imposing sentence on the accused. The order made by him therefore demanded intervention by this court. In doing so I considered the long and well established principle of sentencing that the legislature in

fixing the maximum penalty for a criminal offence intends it only for the worst cases (see *Sia Ah Kew & Ors v. PP* [1974] 1 MLJ 125). This was such a case. I was of the view that on the facts of this case the maximum term of imprisonment prescribed by the section under which the accused had been charged should be imposed on him. Accordingly, I set aside the orders made by the learned magistrate and substituted them with imprisonment for a term of five years from the date of arrest of the accused.